(1)

93-69

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF ALABAMA,

Petitioner,

v.

RICKEY LEE JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION OF THE STATE OF ALABAMA

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QUESTIONS PRESENTED

I.

Whether this Court should grant certiorari and summarily reverse the decision of the Alabama Supreme Court, which is in direct conflict with the federal constitutional principles announced by this Court that require only proof of voluntariness when a defendant's statement is introduced by the prosecution solely to impeach the defendant's credibility?

II.

Whether this Court should grant certiorari and summarily reverse the decision of the Alabama Supreme Court on a question of federal law, holding that proof of full compliance with Miranda v. Arizona, 384 U.S. 436 (1966) is required when the prosecution offers the

defendant's statement for purposes of impeachment, because this decision is in conflict with decisions of the United States Courts of Appeal and with decisions of other state courts of last resort on this federal question?

III.

Whether this Court should grant certiorari and summarily reverse the decision of the Alabama Supreme Court because in ignoring this Court's prior rulings on this Constitutional issue, the Alabama Supreme Court demonstrated hostility toward this Court's supremacy and has now positioned Miranda v. Arizona as a barrier to the admission of voluntary statements for impeachment purposes in all trials in Alabama?

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OPINION BELOW

The January 15, 1993 opinion of the Alabama Supreme Court reversing Rickey Lee Johnson's conviction (Alabama S.Ct. No. 1910945) is not yet reported. The opinion is reproduced as Appendix A in the Appendix volume accompanying this Petition, as is the April 9, 1993 order of the Alabama Supreme Court denying the State's Application for Rehearing, as Appendix B.[1]

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[1]The Appendix to this Petition is separately bound pursuant to Rule 14.1(k).

JURISDICTION

The judgment of the Alabama Supreme Court was issued on January 15, 1993. The Petitioner's Application for Rehearing was overruled on April 9, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself....

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall ... deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

A. Statement of the Facts

Seventy-year-old Emma Whitehead was beaten to death in her home on June 8, 1988. Ms. Whitehead's cousin, Ruby Brown, was beaten and robbed by the same perpetrator, later identified to be Respondent Rickey Lee Johnson. After beating the women and robbing Ms. Brown, Johnson started two fires in the house and fled the scene. Emma Whitehead died, and Johnson was charged with robbery/murder. Ala. Code §13A-5-40(a)(2)(1975).

Johnson gave a statement to the police after his arrest and he completely denied any involvement in the robbery/murder; that statement was audiotaped by the police and it was transcribed. (R. 1078-1114) The prosecution did not offer the statement into evidence in its case-in-chief.

Johnson testified in his own defense at trial (R. 986-1000), and he denied any

involvement in the crime. On direct examination and on cross-examination, Johnson detailed his activities on the day the robbery/murder took place, and he testified about his maneuvers to avoid the police for several days after the crime, as well as his reasons for fleeing from the police. (R. 993-1000, 1002-1035, 1039-1053, 1064-1072) Johnson also testified about the clothing he wore on the day of the robbery/murder. (R. 1008, 1018, 1053-1054, 1059)

During cross-examination, Johnson acknowledged that he previously made a statement to the police. (R. 1074) He explained and/or denied various portions of the statement that conflicted with his trial testimony about, among other things, the clothing he wore on the day of the robbery/murder, his attempts to evade the police, and his reasons for fleeing (R. 1043-1046, 1071-1073, 1076-1077).

In rebuttal, the prosecution offered into evidence the taped statement Johnson gave to the police after he was arrested, that detailed his activities before and after the robbery/murder and contained the statements that he denied and/or explained away during his testimony at trial. Before the tape was admitted into evidence in rebuttal, the prosecutor elicited the following testimony to establish the voluntariness of Johnson's statement:

> Q. [Prosecutor] All right. Then did you have a conversation with Rickey Johnson?
>
> A. [Sergeant Boissel] I did.
>
> Q. All right. Prior to having this conversation with Rickey Johnson did you read him what is commonly known as his Miranda rights?
>
> A. I did.
>
> Q. And prior to having this conversation with Rickey Johnson did you threaten or coerce Rickey Johnson in anyway in order to get him to make a statement to you?
>
> A. I did not.

Q. Did you offer him any reward or hope of reward in order to get him to make a statement to you?

A. No.

Q. Did you tell Mr. Johnson it would be better for him to make a statement or worse for him if he did not make a statement?

A. No, I didn't.

Q. All right. Did he indicate to you that he wished at that time to make a statement?

A. He did.

Q. All right. How did he indicate that?

A. Verbally. Said that he would give me a statement.

(R. 1080-1081)

The sergeant testified about matters relating to the accuracy and integrity of the tape; the trial court admitted the tape into evidence and it was played for the jury. (R. 1083-1114) The tape was admitted over defense counsel's objection that the statement was involuntary and taken in violation of

Johnson's Fifth and Fourteenth Amendment rights. (R. 1121)

B. Proceedings Below

Johnson was indicted by a Jefferson County, Alabama grand jury for robbery/murder, a violation of Ala. Code §13A-5-40(a)(2) (1975). (R. 1311-1312) Following a jury trial, Johnson was convicted of the robbery/murder and sentenced to death. (R. 1332-1335)

On appeal to the Alabama Court of Criminal Appeals, Johnson argued in a footnote in his brief that his statement was erroneously admitted in rebuttal because it was not given voluntarily. The Court of Criminal Appeals affirmed Johnson's conviction and sentence. Johnson v. State, No. CR-90-109 (Ala.Cr.App. Jan. 21, 1992).

On certiorari in the Alabama Supreme Court, Johnson again argued in a footnote in

his initial brief that the prosecution should not have been permitted to introduce his statement in rebuttal because it was not given voluntarily. In Johnson's "Reply and Supplemental" brief in the Alabama Supreme Court he argued, for the first time in any court, that his taped statement was erroneously admitted in rebuttal because the prosecution did not prove complete compliance with Miranda v. Arizona.

In its decision reversing Johnson's conviction and sentence, the Alabama Supreme Court held that reversal for a new trial was required for a single reason: the taped statement was erroneously admitted because the prosecution failed to establish the necessary Miranda predicate. Ex parte Johnson, slip op. at 3-6. (Appendix A, pages 5-10)

In its brief on Application for Rehearing to the Alabama Supreme Court, the Petitioner again argued that the Alabama Supreme Court's

decision was in conflict with prior decisions of this Court. On April 9, 1993, the Alabama Supreme Court overruled, without issuing an opinion, the State's Application for Rehearing. (Appendix B) The cause was remanded for a new trial.

SUMMARY OF THE ARGUMENT

I.

When the Alabama Supreme Court held that the defendant's prior statement to the police was erroneously admitted in the prosecution's rebuttal case for purposes of impeaching his trial testimony because the prosecution had to prove not only voluntariness but also had to prove that the police complied with the requirements of Miranda v. Arizona, that court decided a federal question in direct conflict with the established precedents of this Honorable Court. Beginning with Walder v. United States

and Harris v. New York, this Court decided a series of cases upholding the prosecution's use of evidence and voluntary statements for purposes of impeachment, even when the evidence was inadmissible in the prosecution's case-in-chief because it was obtained in violation of the defendant's Constitutional rights. The Alabama Supreme Court's decision reversing this defendant's capital murder conviction and death sentence on this ground cannot be reconciled with this Court's prior rulings.

II.

When the Alabama Supreme Court held that the defendant's statement was erroneously admitted in the prosecution's rebuttal case for purposes of impeachment because the prosecution failed to prove that the defendant's statement was preceded by full Miranda warnings, the Alabama Supreme Court

decided this federal question in conflict with numerous decisions from the United States Courts of Appeal and other state courts of last resort. Those courts have followed the prior rulings of this Court and have held that even illegally obtained evidence may be introduced by the prosecution in rebuttal or cross-examination to impeach the defendant's trial testimony.

III.

Certiorari review and a summary reversal are warranted here. The Alabama Supreme Court's refusal to acknowledge and follow the consistent rulings of this Court in decisions involving the interpretation of the United States Constitution that clearly control this case resulted in a deviation so extreme that it can, and should, be corrected by a summary reversal.

ARGUMENT

I.

THIS COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE THE DECISION OF THE ALABAMA SUPREME COURT, BECAUSE IN HOLDING THAT PROOF OF FULL COMPLIANCE WITH MIRANDA V. ARIZONA, 384 U.S. 436 (1966) IS REQUIRED WHEN THE PROSECUTION OFFERS THE DEFENDANT'S STATEMENT IN REBUTTAL AND ONLY FOR PURPOSES OF IMPEACHMENT, THE ALABAMA SUPREME COURT HAS DECIDED THIS FEDERAL QUESTION IN DIRECT CONFLICT WITH THE ESTABLISHED PRECEDENTS OF THIS COURT

The prosecution offered Johnson's audiotaped statement in its rebuttal case for impeachment purposes after Johnson testified in his defense. The issue before the Alabama Supreme Court involved the requirements for establishing the admissibility of that statement for impeachment purposes. This Court resolved the issue decades ago.

In Harris v. New York, 401 U.S. 222 (1971), this Court specifically addressed the

principles it discussed in Walder v. United States, Harris v. New York, and Oregon v. Hass, and held that evidence obtained in violation of a defendant's constitutional rights may be used to impeach statements the defendant made during cross-examination that was reasonably suggested by the defendant's testimony on direct examination.

More recently, this Court again declined to disturb its decisions in the cases discussed above, and further held that the prosecution may use, for impeachment purposes, a statement taken in violation of the Michigan v. Jackson, 475 U.S. 625 (1986) rule regarding invocation of a defendant's right to counsel. Michigan v. Harvey, 494 U.S. 344 (1990). In reaching this decision, this Court relied on the principles announced beginning in Harris v. New York that evidence obtained in violation of a defendant's constitutional rights must not be used by the prosecution to

prove its case-in-chief, but that use of such evidence for purposes of impeachment is permitted in order to further the ultimate goal of searching for the truth in a criminal case. This Court stated that it had consistently rejected arguments that would permit defendants to turn the prosecution's improper methods to their own advantage by raising them as shields against proof of the defendants' own false statements. Michigan v. Harvey, 494 U.S. at 351 (quoting Harris v. New York's quotation of Walder v. United States).

Since at least 1954 in the Walder v. United States decision, this Court has consistently interpreted the Constitution to permit the prosecution to admit a variety of evidence for purposes of impeachment, even if the evidence is inadmissible for use in the prosecution's case-in-chief.

II.

THIS COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE THE DECISION OF THE ALABAMA SUPREME COURT, WHICH CONFLICTS WITH NUMEROUS DECISIONS OF THE UNITED STATES COURTS OF APPEAL AND WITH OTHER STATE COURTS OF LAST RESORT THAT RECOGNIZE AND FOLLOW THE FEDERAL CONSTITUTIONAL PRINCIPLES ANNOUNCED BY THIS COURT AND HOLD THAT ONLY PROOF OF VOLUNTARINESS IS REQUIRED WHEN THE PROSECUTION INTRODUCES A DEFENDANT'S STATEMENT SOLELY FOR PURPOSES OF IMPEACHMENT

In accordance with this Court's series of decisions regarding the admissibility of a defendant's statements or other evidence for impeachment purposes, many of which have been discussed above, a multitude of cases in each circuit of the United States Court of Appeals and in other state courts of last resort have also held that the prosecution may impeach a defendant with voluntary statements or other evidence, even though the evidence might not be admissible in the prosecution's case-in-chief. Because there are innumerable

federal and state cases following the decisions of this Court, only a representative few will be discussed below.

A. Federal Appellate Court Decisions

In United States v. Rhodes, 886 F.2d 375 (D.C. Cir. 1989), the defendant was convicted of bank fraud, forgery, and using a false social security number, and he claimed on appeal that reversible error occurred when statements he made during questioning by police officers and a bank security officer were admitted in the prosecution's rebuttal case because they were made without Miranda warnings and because the questioners had difficulty understanding him. Observing that in Harris v. New York, this Court held that statements not preceded by Miranda warnings could be used, as they were in rebuttal in that case, to impeach the defendant's credibility after he testified, the Court of

Appeals further noted that Harris v. New York did not prevent the prosecution from using such statements even if the evidence of perjury is thin. United States v. Rhodes, 886 F.2d at 377-378 (also citing Oregon v. Hass, 420 U.S. 714, 722 (1975)). After rejecting the defendant's claim that the statements were untrustworthy, the Court of Appeals held that no error occurred in admitting the defendant's statements in rebuttal. United States v. Rhodes, 886 F.2d at 378.

In United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983), one of the defendants in a RICO conspiracy case claimed that he should not have been cross-examined about a telephone conversation intercepted by the Government because the Government failed to comply with a federal statute containing certain pre-trial notice requirements. The Court of Appeals held that "the interception, even if not

legally authorized, could be used for impeachment purposes" because this Court's precedents "firmly established that illegally obtained evidence may be used to impeach a defendant on cross-examination." United States v. Winter, 663 F.2d at 1154 (citing United States v. Havens, Oregon v. Hass, Harris v. New York, and Walder v. United States).

Not long after this Court decided Harris v. New York, the petitioner in a habeas corpus case claimed on appeal that a custodial statement he made should not have been introduced at trial because it had been taken after he requested and was denied counsel. United States ex rel. Wright v. LaVallee, 471 F.2d 123 (2d Cir. 1972), cert. denied, 414 U.S. 867 (1973). Citing Harris v. New York, the Court of Appeals rejected the petitioner's claim, finding that no error occurred even if there was a constitutional violation that

would have precluded use of the statement in the prosecution's case-in-chief because the statement was used only on cross-examination to impeach the petitioner's testimony at trial. United States ex rel. Wright v. LaVallee, 471 F.2d at 125.[2]

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[2]These cases also demonstrate that the United States Courts of Appeal have consistently interpreted the decisions of this Court to permit the prosecution to use illegally obtained evidence on cross-examination or in rebuttal to impeach a defendant's trial testimony and have applied the decisions in cases on appeal: United States v. Rowley, 975 F.2d 1357, 1361-1362 (8th Cir. 1992); Bradford v. Whitley, 953 F.2d 1008, 1009-1011 (5th Cir.), cert. denied, 113 S.Ct. 91 (1992); Jones v. Murray, 947 F.2d 1106, 1114-1115 & n.6 (4th Cir. 1991), cert denied, 112 S.Ct. 1591 (1992); United States v. Romero, 692 F.2d 699, 705 (10th Cir. 1982); United States v. Rada-Solano, 625 F.2d 577, 578-579 (5th Cir. (Fla.) cert. denied, 449 U.S. 1021 (1980); United States v. Phillips, 575 F.2d 97, 99-100 (6th Cir. 1978); United States v. Simmons, 567 F.2d 314, 320-321 (7th Cir. 1977); United States v. Cervantes, 542 F.2d 773, 777 (9th Cir. 1976); United States v. McQueen, 458 F.2d 1049, 1052-1053 (3d Cir.),

(Footnote Continued)

From the foregoing brief survey of cases from the United States Courts of Appeal, it is clear that the Alabama Supreme Court's decision, holding that federal Constitutional principles rendered inadmissible for impeachment purposes the defendant's pre-trial statement because proof of compliance with Miranda v. Arizona was lacking, stands in direct conflict with the federal courts' decisions during the past two decades in cases involving identical circumstances. This extraordinary conflict created by the Alabama Supreme Court's failure to acknowledge and apply the relevant Constitutional standards established by this Court should be reviewed and corrected by this Court on certiorari.

(Footnote Continued)
cert. denied, 409 U.S. 857 (1972); and United States v. Cranson, 453 F.2d 123, 124 (4th Cir. 1971), cert. denied, 406 U.S. 909 (1972).

B. Decisions of State Courts of Last Resort

Numerous courts of last resort in other states have also decided this federal question in accordance with the decisions of this Court during the decades preceding the Alabama Supreme Court's dramatic departure from those precedents. This extraordinary conflict, too, demonstrates the need for this Court's certiorari review and reversal of the Alabama Supreme Court's decision.

Last year, the Supreme Court of Colorado reviewed a case in which the trial court excluded the testimony of the defendant's mental health expert, but permitted the prosecution to cross-examine the defendant regarding statements he made to the expert that were inconsistent with the defendant's trial testimony. Lanari v. People, 827 P.2d 495 (Colo. 1992). The defendant claimed that this violated the attorney-client privilege,

his right to effective assistance of counsel, and his privilege against self-incrimination. The Colorado Supreme Court rejected the claims, observing that it and this Honorable Court had repeatedly held, in various constitutional contexts, that prosecutors may impeach a defendant with voluntary statements that would be inadmissible in the prosecution's case-in-chief. Lanari v. People, 827 P.2d at 501. That court reiterated that the limited admissibility of inconsistent, voluntary statements for purposes of impeachment was based on the concept that the search for truth in criminal proceedings should be encouraged, that false testimony by the defendant would subvert that essential function, and that absent the rule permitting the prosecution from using voluntary statements for impeachment purposes, there would be "no effective means ...

available to prevent the defendant from testifying falsely." Id. (citations omitted).

A decade earlier, the Supreme Court of Montana rejected a defendant's claim that due to a denial of his right to counsel during a pre-trial interview, the tape recorded statement he made should not have been admitted for purposes of impeaching his testimony at trial. State v. Cartwright, 650 P.2d 758 (Mont. 1982). Noting the "critical distinction", that the taped statement was not used in the prosecution's case-in-chief but only for impeachment,[3] the Supreme Court of Montana stated that it had followed the rule set out by this Court in Harris v. New York and Oregon v. Hass, and that there was a very good reason for the rule, which is to

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[3]This "critical distinction" is precisely the one that the Alabama Supreme Court ignored in its decision in this case.

prevent the Miranda shield to allow the defendant to commit perjury. State v. Cartwright, 650 P.2d at 761-762. The court declined to change this "sound rule", and held that the trial court properly allowed the prosecution to impeach the defendant with portions of the taped statement. State v. Cartwright, 650 P.2d at 762-763.

In Washington v. State, 432 So.2d 44 (Fla. 1983), the defendant appealed from his capital murder conviction and argued that his confession should not have been allowed into evidence because it was obtained in violation of his constitutional rights. Citing Harris v. New York, the Florida Supreme Court quickly rejected the claim and held: "The confession was presented by the state in rebuttal after appellant had testified in his own defense. Therefore, it was not necessary for the state to establish that the requirements of Miranda ... had been followed in obtaining the

confession." Washington v. State, 432 So.2d at 47. When presented with the same circumstances in Ex parte Johnson, the Alabama Supreme Court incorrectly determined that the prosecution did, in fact, have to establish that the requirements of Miranda had been followed. In doing so, the Alabama Supreme Court rendered a decision that places it in sharp conflict with numerous other state courts of last resort.[4]

For this additional reason, this Court should grant certiorari and should summarily reverse the decision of the Alabama Supreme Court.

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[4]For other state cases interpreting and applying this Court's precedents on this issue in conflict with Ex parte Johnson, see, e.g., State v. Slowinski, 450 N.W.2d 107, 110-111 (Minn. 1990); State v. Graham, 768 P.2d 259, 264-267 (Kan. 1989); State v. King, 320 S.E.2d 1, 7-8 (N.C. 1984); and People v. Maerling, 474 N.E.2d 231, 232-233 (N.Y. 1984).

III.

THIS COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE THE DECISION OF THE ALABAMA SUPREME COURT BECAUSE, IN IGNORING THIS COURT'S PRIOR RULINGS ON THIS FEDERAL QUESTION, THE ALABAMA SUPREME COURT DEMONSTRATED HOSTILITY TOWARD THIS COURT'S SUPREMACY AND HAS NOW POSITIONED MIRANDA V. ARIZONA AS A BARRIER TO THE ADMISSION OF VOLUNTARY STATEMENTS FOR IMPEACHMENT PURPOSES IN ALL TRIALS IN ALABAMA

In reversing Johnson's conviction on Miranda v. Arizona grounds, the Alabama Supreme Court cited and relied on five state cases.[5] None of the cases indicate that the prosecution introduced the defendant's statement only on cross-examination or in rebuttal, so each of

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[5]The cases cited are: Ex parte Callahan, 471 So.2d 463 (Ala. 1985); Arthur v. State, 575 So.2d 1165 (Ala.Cr.App. 1990); Robinson v. State, 399 So.2d 902 (Ala.Cr.App. 1981); Thomas v. State, 370 So.2d 1066 (Ala.Cr.App. 1978); and Swicegood v. State, 277 So.2d 380 (Ala.Cr.App. 1973).

those cases discusses the established requirements for a proper predicate under Miranda v. Arizona, which is necessary when the defendant's statement is admitted in the prosecution's case-in-chief. Each of the cases was therefore irrelevant to the facts of the case the Alabama Supreme Court was reviewing, because the prosecution did not offer Johnson's statement in its case-in-chief, but only in rebuttal after Johnson testified. In requiring proof of compliance with Miranda v. Arizona the Alabama Supreme Court ignored post-Miranda decisions of this Court spanning nearly two-and-a-half decades that have consistently held that the prosecution must prove only the voluntariness of the statement in these circumstances. The radical, impermissible, and unexplained departure from the rulings of this Court cannot be tolerated for at least two reasons.

First, the Alabama Supreme Court's refusal to follow the rulings of this Court necessitates action from this Court to "vindicate the supremacy of federal law." Florida v. Meyers, 466 U.S. 380, 383 (1984)(Stevens, J., Brennan J., and Marshall, J., dissenting). See also Cooper v. Aaron, 358 U.S. 1, 17-19 (1958) (reviewing principles that established that this Court's interpretation of the Constitution is the supreme law of the land). If the Alabama Supreme Court's judgment is allowed to stand, then this Court's prior decisions on this issue have no meaning and the rights acquired under those decisions will simply not exist in Alabama.

The second reason that this Court should grant certiorari and summarily reverse the Alabama Supreme Court's decision is that it will erode any sense of certainty that might have surrounded the interpretation and application of Miranda v. Arizona and its

progeny in Alabama. This decision will not quickly and quietly disappear as an unfortunate aberration in Alabama law. A summary of the decision was included, two months ago, in The Alabama Lawyer, the official publication of the Alabama State Bar. (Appendix C) Because the decision so restricts the admissibility of evidence by the prosecution, it will be cited by many defense attorneys, and Alabama's trial and appellate judges will be required to follow this ruling of the Alabama Supreme Court. Thus, in future trials in Alabama, proof that a statement was voluntarily given will not be enough to allow a defendant's statement into evidence as impeachment of his prior testimony, as Harris v. New York has provided for since 1971. If the Alabama Supreme Court is free to ignore Harris v. New York, it is reasonable to assume

that other precedents of this Court are at risk as well.[6]

Equally as clear as the need for this Court's action in this case is its jurisdiction to act. The Alabama Supreme Court's decision rests primarily on federal law. Michigan v. Long, 463 U.S. 1032 (1983). That Alabama Supreme Court referred throughout its opinion to Miranda v. Arizona, Miranda warnings, a Miranda predicate, and to that court's previous analysis (in a case involving a Miranda violation where the defendant's statement was admitted in the prosecution's case-in-chief) of United States Supreme Court

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[6]State of Alabama v. Tracy Monique Caldwell, a case currently before this Court on petition for a writ of certiorari, demonstrates an Alabama appellate court's previous departure from this Court's Fifth Amendment decisions, and an expansion of the exclusionary rules of evidence announced by this Court with regard to Miranda v. Arizona.

decisions. The state cases cited in the opinion all discuss Fifth Amendment principles and Miranda v. Arizona as well. There being no adequate or independent state ground, this Court's jurisdiction cannot be questioned.

Similarly, the need and justification for summary disposition of this case is apparent. This Court has summarily disposed of cases only occasionally and when the lower court has ignored, misunderstood, or misapplied this Court's prior rulings. Florida v. Meyers, 466 U.S. 380 (1984); Torres-Valencia v. United States, 464 U.S. 44 (1983). See also El Vocero de Puerto Rico v. Puerto Rico, 113 S.Ct. 2004 (1993); Delo v. Lashley, 113 S.Ct. 1222 (1993); Smith v. Ohio, 110 S.Ct. 1288 (1990); Delo v. Stokes, 110 S.Ct. 1880 (1990)(all summarily disposing of cases). This is precisely what occurred in the Alabama Supreme Court. The rulings of this Court in Harris v. New York and its progeny permit the

introduction of a defendant's prior statement for impeachment purposes without proof of a proper Miranda predicate. The Alabama Supreme Court's ruling requiring proof of a Miranda predicate ignores those controlling decisions and is clearly inconsistent with those precedents. Summary disposition is therefore proper here.

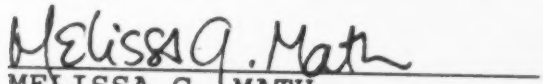
CONCLUSION

The Alabama Supreme Court's decision in this case is in direct conflict with the controlling decisions of this Court. Not surprisingly, it conflicts with numerous decisions from other state courts of last resort and from the United States Courts of Appeals, which have acknowledged and applied this Court's decisions. The Petitioner respectfully submits that in order to vindicate the supremacy of this Court's decisions on the issue of admissibility of

rebuttal evidence in Alabama, this Court should grant certiorari and summarily reverse the judgment of the Alabama Supreme Court.

Respectfully submitted,

JAMES H. EVANS
ALABAMA ATTORNEY GENERAL



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Supreme Court, U.S.
FILED

NO. 93-69

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF ALABAMA,

Petitioner,

v.

RICKEY LEE JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

APPENDIX TO THE PETITION OF THE STATE OF ALABAMA

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APPENDIX A

OPINION OF THE SUPREME COURT OF ALABAMA

Released

January 15, 1993

Clerk

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1992-93

1910945

Ex parte Rickey Lee Johnson

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: Rickey Lee Johnson

v.

State)

(Jefferson Circuit Court, CC-88-3582;
Court of Criminal Appeals, CR-90-109)

STEAGALL, JUSTICE.

Rickey Lee Johnson was convicted in the Jefferson Circuit Court of capital murder. In a unanimous decision, the Court of Criminal Appeals affirmed Johnson's

conviction and sentence. Although Johnson raises numerous issues on appeal, we find it necessary to address only three of those issues.

A detailed discussion of the facts is contained in State v. Johnson, [CR-90-109, January 21, 1992] ___ So.2d ___ (Ala.Cr.App. 1992); thus, we begin by noting only the most pertinent details from the record. Seventy- year-old Emma Whitehead was severely beaten in her house on the afternoon of June 8, 1988, sustaining numerous head injuries that contributed to her death. Ruby Brown, Whitehead's cousin and housemate, testified at trial that she came onto the scene of the attack at approximately 3:45 p.m. She walked into Whitehead's house and saw a man, whom she later identified as Johnson, standing behind the door holding an electric clothes iron. The house had been ransacked. Johnson hit Brown with the iron, knocking her off

balance, and then hit her in the head with a crystal candy dish. He left the room, and Brown escaped out the front door into the yard; however, Johnson overtook her and dragged her back into the house, telling her that he was going to kill her. Once inside, he grabbed a brass lamp and hit Brown with it. She then saw him grab her purse and take about $78 dollars from it. Brown asked Johnson what he had done to Whitehead, and then she began to scream for help. Johnson replied that Brown should save her energy because Whitehead was going to need her assistance. He then began to beat Brown again, demanding money. Brown pretended to lose consciousness, until Johnson went into a back room of the house. She then realized that the house was on fire, and she escaped through the front door. When the police arrived, they found Whitehead's body; it was later determined that she had died from head injuries and smoke inhalation.

In the ensuing investigation of the murder, the police arrested Johnson as a suspect. Following his arrest, Johnson gave a statement to the police, which was audiotaped. His picture was included in a photographic array shown to Brown on June 16, 1988, and he appeared before her in a line-up on July 7, 1988. Brown was unable to identify her assailant on either occasion. Immediately after the July 7 line-up, Brown went to the office of Sgt. Randy Boissel, the investigating officer on the case, to look at another group of photographs. Boissel began to locate and organize photographs of several men who spent time at a vacant house located beside Brown's home. At trial, Brown testified that a photograph of Johnson fell out of one of the photograph books and that she then identified the person pictured in that photograph as her assailant.

The first issue raised is whether the trial court erred in admitting into evidence the audiotaped statement Johnson gave to the police following his arrest. Johnson contends that that statement was involuntary and violated the principles of Miranda v. Arizona, 384 U.S. 436 (1966), and was thus due to be suppressed.

An in-custody statement by an accused is prima facie involuntary and inadmissible; to overcome this presumption, the State must first establish that before the defendant gave his statement the police informed him of his rights, as required by Miranda. Ex parte Callahan, 471 So.2d 463 (Ala. 1985). See, also, Swicegood v. State, 50 Ala.App. 105, 277 So.2d 380 (1973). To this end, the State must spell out with clarity and precision the specific Miranda warnings the police gave to the defendant. Swicegood.

At trial, Sgt. Boissel testified that Johnson volunteered to give a statement

following his arrest and after being given a Miranda warning. Boissel testified:

> "Q. All right. Prior to having this conversation with Rickey Johnson did you read him what is commonly known as his Miranda rights?
>
> "A. I did."

This was the extent of the State's inquiry as to exactly what the police said to Johnson concerning his Miranda rights before they took his statement. Under the principles of Swicegood, this exchange was not sufficient to establish the necessary Miranda predicate, because the general question of whether the Miranda warnings were given does not adequately establish whether the warnings were properly given and understood by the defendant. Swicegood. See, also, Arthur v. State, 575 So.2d 1165 (Ala.Crim.App. 1990), cert. denied, 575 So.2d 1191 (Ala. 1991); Robinson v. State, 399 So.2d 902 (Ala.Crim.App. 1981); and Thomas v. State, 370 So.2d 1066

(Ala.Crim.App. 1978), writ quashed, 370 So.2d 1070 (Ala. 1979). In each of those cases, the State sought to establish a Miranda predicate by merely asking the police whether the warnings were given, and this was consistently held to be inadequate under Swicegood. The Court of Criminal Appeals properly explained in Thomas:

> "The simple question 'Did you read the defendant his rights as per the Miranda decision,' does not indicate whether the rights were read before or after questioning, whether the defendant understood the rights, and whether he made an intelligent waiver of these rights. Even in cases where officers have attempted to give a detailed Miranda warning, key elements have been left out or misstated; thus, it is critical that the testifying officer give some detail as to exactly what language was used for the Miranda warning and under what circumstances."

370 So.2d at 1070.

In Ex parte Callahan, 471 So.2d 463 (Ala. 1985), this Court was urged to overrule Swicegood, and we specifically

addressed that opinion and its progeny for the first time. After a detailed analysis of the United States Supreme Court decisions underlying Swicegood, as well as earlier Alabama cases, we concluded that Swicegood has a solid foundation in constitutional law and that any attempt to overrule it "would be but an effort to overrule the United States Supreme Court, a power which does not reside with this Court". Callahan, 471 So.2d at 467. We likewise have no power to deviate from Swicegood today.

We note that in-custody statement given by the defendant relating to purely collateral matters and not inculpatory in any respect do not fall under the principle of Swicegood and, thus, evidence of such statements is admissible without the showing of a proper Miranda predicate. Cartwright v. State, 469 So.2d 674 (Ala.Crim.App. 1984). Here, some of the statements contained in the audiotape are in regard to

purely collateral matters and would not, standing alone, invoke the principles of Swicegood. There are other statements, however, that do connect Johnson with the crime of which he is accused. On the tape, Johnson admitted he knew that the police were looking for him to question him about Whitehead's death and about another "felony warrant" sworn out on him. He stated that he was "afraid of what they said I had done" and described how he eluded the police by going from house to house on the day after the crime. He stated that, while eluding arrest, he confessed to a friend that "I got myself into a little trouble." Johnson also described how members of his family and a friend all accused him of burning Whitehead's house. Because these statements relate to matters that are not purely collateral, evidence of them was inadmissible without a proper Miranda predicate.

The State argues that even if evidence of Johnson's statements was inadmissible, its introduction into evidence was harmless error. We must recognize, however, that Johnson's statement that he had gotten himself into trouble and that he had eluded the police, as well as his statements regarding the accusations of his family and friend, were in some respects inculpatory. We cannot therefore hold that the improper admission of this evidence constituted harmless error.

Although we reverse for the reasons stated above, for the sake of judicial economy we address two other issue raised by Johnson, which are almost certain to come up again on remand for a new trial.

First, Johnson argues that the pretrial eyewitness identification procedures were unnecessarily suggestive and that the resulting identification evidence was therefore inadmissible. Pretrial

identifications are to be set aside on grounds of prejudice only if the pretrial identification procedure is so suggestive as to give rise to a substantial likelihood of misidentification. Ex parte Stout, 547 So.2d 901 (Ala. 1989). The totality of the circumstances surrounding the out-of-court identification need be analyzed only when the pretrial procedures used appear to have been unnecessarily or impermissibly suggestive. Stout.

Johnsons argues that because his picture was included in two photographic arrays and he appeared in a line-up before Brown identified him, the process of identification was improperly repetitive. To bolster his argument, Johnson relies on Foster v. California, 394 U.S. 440 (1969), wherein the United States Supreme Court held that a robbery victim's identification of the defendant was tainted because the victim had been repeatedly exposed to the defendant

in pretrial identification processes. In that case, the defendant was presented to the victim in a line-up, and the victim was unable to positively identify him. The victim asked for the opportunity to speak to the defendant, and he was subsequently brought in alone and seated across from her: however, the victim was still uncertain whether he was the guilty man. The police held a second line-up, and at that line-up the victim was "convinced" that the defendant was the robber. The participants in the line-ups did not bear a particular resemblance to the defendant, and the defendant was the only individual to participate in both line-ups. The Supreme Court held that by repeatedly presenting the defendant to the victim and by isolating him after the first line-up, the police "arranged" pretrial confrontations that made the resulting identification of the defendant virtually inevitable. The Court

stated that, "in effect, the police repeatedly said to the witness 'This is the man,'" Foster, 394 U.S. at 443 (emphasis original), and concluded that this procedure so undermined the reliability of the identification process so as to violate the defendant's due process rights.

In this case, there is no indication that the police repeatedly arranged confrontations between Johnson and Brown; the mere fact that Brown was shown Johnson's picture and also saw him in the line-up does not establish any impropriety in the identification process. Under Alabama law, it is not error to have a defendant participate in both a photographic array and a line-up, even though he may be the only common participant in the two procedures. Nicholes v. State, 409 So.2d 454 (Ala.Crim.App. 1984). Unlike Foster, this case presents no evidence that the defendant was ever singled out by the police or that

the witness was coerced by the police to choose the defendant. Moreover, the record indicates that the individuals in the photographic array and the line-up were physically similar to Johnson. The officer in charge of choosing the individuals for the line-up testified at trial that he took special care to locate participants who resembled Johnson, so that it would be as difficult as possible for Brown to distinguish Johnson. Because these pretrial identifying procedures did not make Brown's identification of Johnson inevitable, the Court of Criminal Appeals correctly held that the pretrial identification procedures were not impermissibly suggestive and that Brown's identification testimony was properly presented to the jury for its consideration. We are not, therefore, required to further examine the totality of the circumstances to determine whether there

was a substantial likelihood of misidentification.

Next, Johnson argues that the evidence does not show that he murdered Whitehead during a first-degree robbery of Brown. Johnson points out that, under Alabama law, a robbery committed as a "mere afterthought" and unrelated to the murder will not sustain a conviction for the capital offense of robbery murder, pursuant to §13A-5-40(a)(2). He argues that the State failed to prove that his robbery of $78 from Brown was related to his murder of Whitehead and further argues that the jury was not properly instructed as to the evidentiary requirements of §13A-5-40(a)(2).

To sustain a conviction under §13A-5-40(a)(2), the State must prove beyond reasonable doubt (1) a "robbery in the first degree or an attempt thereof," as defined by §13A-8-41; (2) a murder as defined by §13-6-2(a)(1); and (3) that the

murder was committed "during" the robbery or attempted robbery, i.e., that the murder was committed "in the course of or in connection with the commission of, or in the immediate flight from the commission of" the robbery or attempted robbery in the first degree. §3A-5-39(2); Hallford v. State, 548 So.2d 526 (Ala.Cr.App. 1988), affirmed, Ex parte Hallford, 548 So.2d 547 (Ala.), cert. denied, 493 U.S. 945 (1989). The intentional killing must take place during the course of the robbery in question; however, the taking of the property of the victim need not occur before the killing. Hallford. Moreover, the capital offense of robbery-murder encompasses a robbery-murder in which the person killed is not the person robbed. Taylor v. State, 442 So.2d 128 (Ala.Crim.App. 1983). The fact that the murder victim was dead when the property was taken would not prevent a finding of robbery, if the murder and the taking of

property formed a continuous chain of logically related events. Hallford. The question whether the defendant had the intent to kill at the time of the taking is usually a jury issue, and the jury may infer from the facts and circumstances that a robbery began when the accused attacked the victim and that the capital offense was consummated when the accused took the robbery victim's property and fled. Hallford.

Johnson contends that, according to the evidence, Whitehead's murder was complete before Brown arrived at the house and that the robbery of Brown was thus the result of a mere afterthought arising after Whitehead's murder. This argument is not supported by the record, which would support a finding that Whitehead's murder was not complete until after Johnson had robbed Brown. The record shows that the house was ransacked at the time Brown arrived. During

the course of his attack on her, Johnson not only robbed Brown but also repeatedly demanded that she tell him where Whitehead kept her money. Johnson told Brown that Whitehead would need her assistance later, thus indicating that Whitehead was still alive at that time. Most significantly, evidence regarding Whitehead's autopsy reveals that she had a high level of carbon monoxide in her blood and sooty deposits in her lungs; from this, the jury could properly infer that Whitehead was breathing when Johnson set the house ablaze, after he had robbed Brown. The jury could further infer that Johnson intended to rob Brown when she entered the house and that Whitehead's death occurred in the course of Johnson's attempt to execute this robbery. Accordingly, we find no merit in Johnson's argument regarding the sufficiency of the evidence.

In view of the foregoing, the judgment of the Court of Criminal Appeals is reversed and this cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hornsby, C. J., and Maddox, Shores, Adams, Houston, and Kennedy, JJ., concur.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

April 9, 1993

1910945

Ex parte Rickey Lee Johnson. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Rickey Lee Johnson v. State) (90-109) (Jefferson: CC-88-3582)

IT IS ORDERED that the application for rehearing filed in the above cause on February 16, 1993, be, and the same is hereby, overruled. NO OPINION.

STEAGALL, J. - Hornsby, CJ., Maddox, Shores, Adams, Houston and Kennedy, JJ., concur.

APPENDIX C

THE ALABAMA LAWYER

Vol. 54, No. 3, page 198

May 1993

SUPREME COURT OF ALABAMA -- CRIMINAL

AFFIRMATIVE WAIVER REQUIREMENT OF MIRANDA

Johnson v. State, 27 ABR 1215 (January 15, 1993). Johnson was convicted of capital murder; on certiorari to the Supreme Court of Alabama, he contended that an audiotaped statement given to the police following his arrest violated the principles of Miranda v. Arizona, 384 U.S. 436 (1966).

The law is clear that an in-custody statement by an accused is prima facie involuntary and inadmissible; to overcome this presumption, the State must first establish that before the defendant gave his statement, the police informed him of his

rights as required by Miranda. Swicegood v. State, 50 Ala.App. 105, 277 So.2d 380 (1973). To this end, the State must spell out with clarity and precision the specific Miranda warnings the police gave to the defendant.

At trial, a police officer testified that Johnson volunteered to give a statement following his arrest and after being given a Miranda warning. The officer testified:

> Q: All right. Prior to having this conversation with Ricky Johnson, did you read him what is commonly known as his Miranda rights?
>
> A: I did.

This was the extent of the State's inquiry as to exactly what the police said to Johnson concerning his Miranda rights before they took his statement.

In reversing, the Supreme Court held that under the principles of Swicegood, this exchange was not sufficient to establish the necessary Miranda predicate because the

general question of whether the Miranda warnings were given does not adequately establish whether the warnings were properly given and understood by the defendant. See also Arthur v. State, 575 So.2d 1165 (Ala.Crim.App. 1990), cert. denied, 575 So.2d 1191 (Ala. 1991).

Supreme Court, U.S.
FILED
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NO. 93-69

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF ALABAMA,
Petitioner,
v.
RICKEY LEE JOHNSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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No. 93-69

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF ALABAMA,	)
Petitioner,	)
v.	)
RICKEY LEE JOHNSON,	)
Respondent.	)

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

COMES NOW RICKEY LEE JOHNSON, who respectfully files the following opposition to the State of Alabama's *Petition for a Writ of Certiorari to the Supreme Court of Alabama* (hereinafter "*Petition*").

A. INTRODUCTION AND SUMMARY OF ARGUMENT

On August 11, 1989, Rickey Lee Johnson was found guilty of capital robbery-murder in Jefferson County, Alabama. On November 20, 1989, the trial court sentenced Mr. Johnson to die in the electric chair.

Roughly three years later, in January, 1993, the Alabama Supreme Court, reversed and remanded Mr. Johnson's case for a new trial. Without a single dissent, the court held a violation of Miranda v. Arizona had rendered Mr. Johnson's trial fatally infirm. Ex parte Rickey Lee Johnson, No. 1910945, slip op., (Alabama Supreme Court Jan. 15, 1993).

The State of Alabama has now petitioned this Court for a writ of certiorari. (I) The State's petition, however, was filed out of time.

Untimeliness aside, (II) neither the challenged state court decision, Ex parte Rickey Lee Johnson, nor any part of the record below supports even one of the Petitioner's three *questions presented for review* (hereinafter *questions presented*).

More specifically, each *question presented* rests on the notion that the Alabama Supreme Court's application of Miranda v. Arizona was to a post-arrest statement used only to impeach the defendant's testimony. This is simply not so.

True, Mr. Johnson's statement came into evidence only after the defense had rested. Despite the timing of its admission, however, the post-arrest statement, running roughly thirty pages and heard *in toto*, was in no way confined to mere prior inconsistencies. Furthermore, no jury instruction limited the statement's use to determining defendant credibility. Last, the prosecution, during its cross-examination of Mr. Johnson, had

neglected even to lay the full foundation for impeachment with extrinsic evidence.

Even if the Petitioner's *questions presented* had some factual grounding, moreover, (III) there exist no "special or important reasons" for certiorari review. The Petitioner, essentially, seeks to enlist this Court to correct what, granting the Petitioner's interpretation of Ex parte Rickey Lee Johnson, would still be an insignificant aberration in Alabama case law.

Finally, (IV) nothing permits the summary reversal the Petitioner proposes for the legally sound decision rendered by the Alabama Supreme Court. Indeed, even had the Alabama Supreme Court been passing on the admissibility of a statement admitted for mere impeachment, the court's result, *viz.* reversal, would still have been correct. For even a statement allowed only to impeach must be voluntary at its core. Mr. Johnson's request for a hearing on such voluntariness, however, was never honored. The statement admitted, therefore, remained presumptively involuntary. This provides yet another reason why certiorari review should not be granted, but, even more, makes summary reversal unthinkable.

B. REASONS WHY THE PETITION SHOULD BE DENIED

I. BY FAILING TO FILE ITS PETITION IN A TIMELY FASHION, THE STATE OF ALABAMA HAS FORGONE REVIEW BY THIS COURT, PURSUANT TO 28 U.S.C. § 2101(d) AND SUPREME COURT RULE 13.

A petitioner for a writ of certiorari, to be timely, must file his petition within ninety days (90) after the date of judgment or, where applicable, within ninety days (90) after denial of rehearing by the court to whom the writ would be directed. 28 U.S.C. §§ 2101(d)(1988); Sup. Ct. R. 13.

The Alabama Supreme Court overruled the Petitioner's Application For Rehearing on April 9, 1993. The Petition, however, did not arrive in this Court until July 12, 1993, ninety-four (94) days after the Alabama Supreme Court denied rehearing.

Reliance on Supreme Court Rule 29.2's provision for date of mailing as date of service will not assist the Petitioner, furthermore. The Petition was postmarked July 9, 1993. As a date of filing, July 9 would still constitute the ninety-first day after denial of rehearing below.

Last, Respondent is unaware of any enlargement granted, or even sought by, the Petitioner pursuant to Supreme Court Rule 30. Likewise, Respondent is unaware of Petitioner having either proffered any good cause for its lapse or shown why the "ends of justice" demand the lapse be overlooked. Schact v. United States,

398 U.S. 58, 63-64 (1970).

II. NEITHER THE DECISION NOR THE RECORD BELOW RAISES THE QUESTIONS PRESENTED IN THE PETITION.

The Alabama Supreme Court's decision made no mention of extending Miranda v. Arizona, 384 U.S 436 (1966), to statements used simply to impeach. It did not even hint at abandonment of the constitutional doctrine grounded in Harris v. New York, 401 U.S. 222 (1971), and Oregon v. Hass, 420 U.S 714 (1975). In fact, it failed even to cite those cases or their progeny. Ex parte Rickey Lee Johnson, slip op. at 1-11.

That failure did not, as suggested by the Petitioner's *questions presented*, constitute a "direct conflict with the federal constitutional principles announced by this Court", a "conflict with the decisions of the United States Courts of Appeal...and other state courts", or a "demonstrated hostility toward this [United States Supreme] Court's supremacy". *Petition* at i-iii. It reflected instead that, at trial, Mr. Johnson's statement was not used for the limited, impeachment purposes contemplated by Harris and Hass; it reflected that the prosecution was, in essence, allowed to fatten its case-in-chief during its rebuttal case and to do so with a lengthy non-Mirandized statement.

All this the record makes clear in three ways.

A. The Thirty-Page Statement, Played Unedited For The Jury, Went Beyond Any Semblance Of Mere Impeachment.

It is true the prosecution put Mr. Johnson's statement into evidence after Mr. Johnson testified. It is also true the prosecution had cross-examined Mr. Johnson about four brief and minor points where his post-arrest statement purportedly contradicted his trial testimony. This did not, however, justify the wholesale introduction of a lengthy, unedited post-arrest statement under the guise of impeachment.

Those portions of Mr. Johnson's cross-examination during which he was supposedly impeached added up to **no more than three pages** of trial testimony. (R. 1043 (lines 5-20); 1045 (lines 11-23); 1046 (lines 1-4); 1071 (lines 12-21); 1076 (lines 19-23); 1077 (lines 1-6)) Even more to the point, those specific post-arrest comments constituting the purported basis for this impeachment came to **less than a page and a quarter** when played into the trial record. (R. 1100 (lines 7-14); 1099 (lines 20-23); 1089 (lines 6-14); 1096 (lines 16-23)) Additionally, each was contained in the typed police transcript of Mr. Johnson's statement, a transcript which a police official swore to be "true and accurate". (R. 1084)

Still, the state did not, in its so-called rebuttal case, put into evidence the one or two pages worth of relevant, i.e., allegedly inconsistent, police transcript. The state did not even

select out, and then play, only the pertinent portions of the tape recording.

Rather, the prosecution -- with the full leave of the court and despite defense exception (R. 1084) -- played for the jury the whole tape, beginning to end, almost **thirty pages** long (R. 1085-1114), unabridged and unedited. Thus the jury heard not just those few post-arrest remarks that supposedly conflicted with Mr. Johnson's trial testimony; it also heard a devastating collection of comments wholly unrelated to impeachment and flowing directly from Mr. Johnson's own tape-recorded lips into the state's case-in-chief:

By dint of his recorded statement, for example, the jury heard Mr. Johnson say that, prior to arrest, he had confessed to a friend that **"I got myself into a little trouble"**. (R. 1090)

At the same time, the jury heard Mr. Johnson tell how his own cousin had, upon hearing he was under suspicion, asked, **"Rickey, what you done now"**. (R. 1088) The jury also heard Mr. Johnson describe how his cousins had themselves believed **"I burnt that old lady house"**. (R. 1088)

And the jury no doubt paid special attention when Mr. Johnson, who at the beginning of the tape had been identified by three different alias, assented to the assertion of his interrogator (a Sergeant Boissel) that **"the police have been looking for you to talk to you <u>about this</u>, <u>and</u> you are <u>also</u> aware**

of a felony warrant on yourself". (R. 1085; 1108; underscoring added)

The Alabama Supreme Court very correctly recognized the particular harmfulness of these, among other, comments unrelated to any impeachment of defendant's testimony. Ex parte Rickey Lee Johnson, slip op. at 6-7.

The trial court's ruling treated Mr. Johnson's exercise of his right to testify -- with its possibility of impeachment -- as a constructive waiver of his rights under Miranda whereby a statement totally inadmissible, except to impeach, became admissible in total. Warrant for this does not exist in case law. See, e.g., Harris, 401 U.S. 222, 223 (1971) (wherein impeachment allowed but court noted full "statement was not shown to the jury"); Bradford v. Whitley, 953 F.2d 1008 (5th Cir. 1992) (wherein the court identified as pivotal that the state had not put the full statement into evidence: "[T]he key point is that it was [defendant], and not the prosecution, that offered the confession into evidence. Under these circumstances Harris[v. New York], and not Edwards[v.Arizona], is decisive"); United States v. Rowley, 975 F.2d 1357, 1361-62 (8th Cir. 1992) (wherein impeachment allowed but with only one discrete remark in defendant's statement); See also Perkins v. State, 574 So.2d 988, 991 n.2 (Ala.Cr.App.1990), cert. denied, 574 So.2d 988 (1991) (wherein court affirms impeachment use of statement but notes that whole of statement put in evidence only

at request of defendant); State v. Cartwright, 650 P.2d 758, 761-763 (Mont. 1982) (wherein initially "various portions" of defendant's statement were used for impeachment and only "at request of the defense" was the entire statement eventually played for the jury).

B. The Jury Considered Johnson's Thirty-Page Statement For All, Not Just Impeachment, Purposes.

Not once did the jurors receive any kind of limiting instruction concerning Mr. Johnson's post-arrest statement (the last piece of guilt phase evidence they were to hear). They, specifically, heard no interim directive or pre-deliberation charge to consider Mr. Johnson's statement exclusively for the purposes of impeachment.

In fact, the trial court's instructions on witness evaluation omitted any reference to prior inconsistent statements; the trial court, rather, repeatedly and affirmatively mandated the jury to consider "all the evidence". (R. 1199; 1195-96; 1201; 1218-20;1225-26)

This instructional omission by the trial court further undercuts the Petitioner's theory that Mr. Johnson won relief in silent contravention of the Harris-Hass exception to Miranda. See, e.g., Harris, 401 U.S. 222, 223 (noting the trial court's instruction that impeachment evidence not to be considered directly

on guilt issue); Hass, 420 U.S 714, 717 (noting jury charge that: "'you may consider that [impeachment] testimony only as it bears on the (credibility) of the Defendant as a witness'"); United States v. Havens, 446 U.S 620, 623 (1980) (affirming conviction where "jury...instructed that the [illegally obtained] rebuttal evidence should be considered only for impeach[ment]"); United States v. Rada-Solano, 625 F.2d 577, 578-79 (5th Cir.), cert. denied, 449 U.S. 1021 (1980) (wherein the district court, addressing defendant's statement, gave an "appropriate limiting instruction"); United States v. Cervantes, 542 F.2d 773, 777 (9th Cir. 1976) (wherein the district court informed the jury: "Now I admitted [defendant's statement] for the purpose of impeachment."); People v. Maerling, 474 N.E. 2d 231, 232-33 (N.Y. 1984) (wherein the trial court "instructed the jury that [defendant's statement] was to be considered only on the issue of defendant's credibility").

C. Not Once Did The Prosecution Lay The Necessary Foundation For Impeachment With Extrinsic Evidence Of Prior Inconsistent Statements.

There is yet a final reason why the Alabama Supreme Court refused to treat Mr. Johnson's post-arrest statement as subject to the Harris-Hass exception. The prosecution, in each of the four purported instances of impeachment, failed to lay properly the required foundation for introduction of extrinsic evidence.

One: Over a series of questions to Mr. Johnson, the prosecution attempted to show, in part through the post-arrest statement, that Mr. Johnson had leapt from an apartment window not, as he testified, because he feared harm from his companions but because he thought they had called the police. (R. 1039-44)

Read in full, however, the post-arrest statement supported Mr. Johnson's in-court testimony. It reflected that Johnson "thought at first" the police had been called. (R. 1100) But it also showed Johnson had ultimately left through the window only because his companions were about to attack him. (R. 1101-02) There were no contradictions, no "conflicting statements", and thus no good faith bases on which to introduce extrinsic evidence of the prior statement. Harris, 401 U.S at 223. See also Wypsinger v. State, 448 So.2d 435, 438 (Al.Cr.App 1983), cert. denied, 448 So.2d 435 (Ala. 1984); McElroy's Alabama Evidence (4th ed. 1991), §155.02(7).

Two: The state next took to impeaching Mr. Johnson over whether a pistol he sought to buy, between the time of the crime and his arrest, was priced at twenty or forty dollars. (R. 1045-46) Only a material fact, however, is a proper area for impeachment under Alabama law. See Wilson v. State, 551 So.2d 447 (Ala.Cr.App.), cert. denied, 551 So.2d 447 (Ala. 1989) (rape victim's prior statement that she "socialized" with defendant was immaterial and thus inadmissible for impeachment). McElroy's

Alabama Evidence (4th ed. 1991), §156.01(1).

It is certain **any** evidence about a firearm purchase was inadmissible as evidence of uncharged crimes and prior bad acts illicitly reflecting on character. And it is beyond certain that whether the gun's price was to be twenty or forty dollars was immaterial, irrelevant and thus not within the allowable scope for impeachment.[1]

Three: On the same basis of immateriality, the state's attempt to impeach Mr. Johnson about his specifically thinking of the electric chair, prior to arrest, was improper. (R. 1069-72) Johnson was asked on cross "Did you think about what kind of possible punishments there were for that crime?" (R. 1070) Mr. Johnson replied: "I'm no dummy...I know what a capital murder is". A moment before he had conceded: "I was scared of what they said I had done". (R. 1070)

Whether Johnson had, further, envisioned Alabama's precise mechanism for execution was inconsequential. It surely provided no excuse for injecting an otherwise inadmissible thirty-page

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[1] Further, whether trial counsel made materiality objections is unclear because the record does not contain transcription of the side-bar conferences. See, e.g., R. 1042. Even if counsel did not register materiality objections, though, there was, under state law, no waiver concerning the erroneous introduction of extrinsic evidence of those immaterial matters. McElroy's Alabama Evidence, (4th ed. 1991) § 156.01(1)n.3. Additionally, Alabama applies a plain error rule to its capital cases. Alabama Rule of Appellate Procedure 45A.

statement into the record.

Additionally, discounting the materiality problem, this impeachment was rendered improper by the prosecutor's flat refusal -- "I don't want to hear what you told him" -- to allow Mr. Johnson to explain how he had "told Sergeant Boissel something similar to that". (R. 1072) This refusal left unclear whether Mr. Johnson was, as required, substantially denying having made the statement in question. Ex parte Watts, 471 So.2d 505, 506-7 (Ala. 1985) (holding Hass did not undo the requirement for a predicate denial of the prior inconsistent statement).

Finally and likewise, when the state attempted to impeach Mr. Johnson on a question of changed clothing, his ambiguous response to his prior statement was: "That is a lie". (R. 1076-77) Did this mean Mr. Johnson was claiming the particular prior comment was a lie on his part? Or that the state's suggestion that he had made the post-arrest comment was a lie? Because the trial court disallowed Mr. Johnson's attempt to clarify,[2] it never became clear. Thus the proper predicate for the introduction of extrinsic evidence was not satisfied.

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[2] Mr. Johnson asked: "May I say something?" The trial court stated: "No, sir. You can step down". (R. 1077) This constituted, additionally, an infringement on Mr. Johnson's right to testify, due process and a fair trial. Ex parte Watts, 471 So.2d at 507("Fairness requires that the witness whose credibility is being attacked be given an opportunity to explain the seeming inconsistencies".).

In sum, neither the prosecution nor the trial court treated Mr. Johnson's statement as simply a fulcrum from which to leverage impeachment; neither displayed any reliance on the Harris-Hass exception. Accordingly, the Alabama Supreme Court had no reason to imagine such reliance where the record belied it.[3]

III. THE PETITIONER'S THREE QUESTIONS PRESENTED DO NOT, ON FACE, MERIT CERTIORARI REVIEW.

Put aside that Petitioner's three *questions presented* have little, or nothing, to do with the record considered or the decision rendered by the Alabama Supreme Court. There still remains here a startling lack of "special and important reasons" for granting review on a writ of certiorari. Sup. Ct. Rule 10.

At best, the Petitioner is claiming that the Alabama Supreme Court made a mistake, that, by ignoring Harris and Hass, the appellate court 'got it wrong'. The Supreme Court of the United States, however, "is not a forum for the correction of errors." Boag v. MacDougall, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting).

Ordinarily, certiorari must be reserved for "conflict among

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[3] Petitioner vaguely suggests that Respondent, when before the Alabama Court of Criminal Appeals and the Alabama Supreme Court, conceded that Mr. Johnson's post-arrest statement was admitted only for rebuttal. *Petition* at 8. The briefs filed in the Alabama appellate courts contradict this assertion: *Brief Of The Appellant Johnson*, *Petitioner Johnson's Brief In Support Of Petition For A Writ Of Certiorari*, *Petitioner Johnson's Reply And Supplemental Brief*.

jurisdictions over an issue which 'imperatively demand[s] a single uniform rule' [and therefore] commands the Court's immediate attention." Brown Transportation Corp. v. Atcon, 439 U.S 1014, 1015 (1978) (citation omitted; emphasis added) (White & Blackmun, JJ., dissenting from denial of certiorari).

No such compelling conflict is even claimed here.

Last, Petitioner contends that Ex parte Rickey Lee Johnson demonstrates open and inevitably contagious "hostility toward this Court's supremacy." As a sign of this danger, the Petitioner notes that *The Alabama Lawyer* synopsized Ex parte Rickey Lee Johnson eight weeks after its issuance. *Petition* at 30-33. As revealed in the Petitioner's own appendix, though, *The Alabama Lawyer* did not interpret the decision as a rejection of Hass or Harris but as a somewhat routine enforcement of Miranda in a case where a defendant's statement was presumably considered for all purposes. *Appendix to the Petition* at 21-23.

IV. THE SUMMARY REVERSAL THE STATE OF ALABAMA DESIRES WOULD BE WHOLLY UNJUSTIFIED.

The Petitioner, apparently relying on Supreme Court Rule 16, asks that the Alabama Supreme Court be summarily reversed. *Petition* at 30-36. Such dispositions, though, are "rare disposition[s] usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error". Schweiker v. Hansen,

450 U.S. 785, 791 (1981) (Marshall & Brennan, JJ., dissenting).

Plainly, Mr. Johnson's case does not present such a situation. As shown in Argument II, Mr. Johnson's post-arrest statement did far more than simply impeach the defendant. The Petitioner thus premises his claim of state court error on a wholly untenable and private interpretation of Ex parte Rickey Lee Johnson as trampling on the rule of Harris and Hass.

But even if Mr. Johnson's post-arrest statement had served only to impeach, thus making Harris and Hass applicable, reversal would still have been due under state and federal law. To qualify for admission under Harris and Hass, a statement can defy Miranda requirements but must be, at its core, voluntary. Michigan v. Harvey, 494 U.S. 344, 351 (1990). Mr. Johnson was entitled, as requested (R. 001390), to a hearing on voluntariness. Jackson v. Denno, 378 U.S. 368 (1964).

Indeed, by the law of Alabama at least, he was entitled to precisely the hearing outside the presence of the jury which his pre-trial motion explicitly contemplated. (R. 001390) Felder v. State, 470 So.2d 1321, 1326 (Al.Cr.App. 1984), aff'd, 470 So.2d 1330 (Ala. 1985), vacated on other grounds, 474 U.S 976 (1985) (defendant so requesting entitled to a hearing on statement voluntariness outside jury's presence). See also Jones v. State, 584 So.2d 917, 919 (Al.Cr.App.), cert. denied, 584 So.2d 917 (Ala. 1991). Cf. Pinto v. Pierce, 389 U.S. 31 (1967) (upholding

conviction where trial court held voluntariness hearing in presence of jury but emphasizing defense counsel's consent to such procedure).

The opportunity for any hearing was never afforded Mr. Johnson amidst the 'slap-dash' injection of his thirty-page statement into the record. (R. 1078-895) He was then doubly deprived. Though "entitled to a reliable and clearcut determination [whether] the [statement] was in fact voluntarily rendered", Lego v. Twomey, 404 U.S. 477, 479 (1972), Mr. Johnson received no such finding. Though entitled to have "the prosecution...prove by at least a preponderance of the evidence that the confession was voluntary", id., Mr. Johnson had no such showing.

Reversal in the Alabama Supreme Court was inevitable under either a Miranda or Harris-Hass analysis. This weighs against certiorari review. See, e.g., Ohio v. Huertas, 498 U.S.____, 111 S. Ct. ____, 112 L. Ed. 2d 837 (1991) (declining to review continuing viability of Booth v. Maryland, 482 U.S 496 (1987)). Even more clearly, it precludes this Honorable Court's summarily reversing to achieve a wrong result.

CONCLUSION

Wherefore, Mr. Johnson respectfully suggests that it would be improvident to grant certiorari in this case.

Respectfully submitted,

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